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Supreme Court, U.S.
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in the

Supreme Court

of the

United States

October Term, 1987

RICHARD ROE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Questions Presented for Review

I. Is there a "real and substantial" fear of self-incrimination where: (A) the compelled testimony of a witness will violate the laws of a specific foreign country; (B) the attorney general of the foreign country has stated that he will prosecute individuals for such violations; and (C) while extradition is now not possible, the witness has substantial ties to the foreign country, travels frequently to the foreign country, has relatives in the foreign country, and owns a home in the foreign country, so that compelling the witness to testify will effectively force the witness to forfeit important liberty and property rights?

II. Does the Fifth Amendment privilege against self-incrimination extend to the "real" and "substantial" fear of prosecution by a foreign country?

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Opinions Below

The decision for which review is sought is the opinion by the United States Court of Appeals for the District of Columbia Circuit in In re: Sealed Case, No. 87-5208, slip. op. (D.C. Cir. August 7, 1987), and attached as Appendix A.[1]

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 7, 1987. This petition is filed within sixty (60) days of that ruling. Jurisdiction is invoked under 28 U.S.C. § 1254. On August 7, 1987, the Court of Appeals also issued an order pursuant to Fed.R.App.P. 41(b),

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[1] The memorandum and order issued January 21, 1987 by the United States District Court for the District of Columbia, the district court's March 12, 1987, modification of that order, and the June 5, 1987, order granting the government's motion to compel, are under seal and have not been attached hereto.

staying the issuance of a mandate for a period of thirty days to enable petitioner to file a petition for writ of certiorari. This petition is filed within thirty (30) days of that ruling.

Relevant Constitutional Provisions

Amendment V to the United States Constitution provides, in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

Factual Background

The petitioner is a citizen of foreign Country X who is employed by a major financial institution wholly-owned by Country X.[2] Before March, 1983, petitioner was the

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2 The grand jury investigation in which the petitioner has been called as a witness has not been completed, and the records in the district and appellate courts have been sealed. In order to maintain secrecy under Rule 6(e), Fed. R. Crim. P., the parties and relevant foreign countries have not (Footnote Continued)

Deputy General Manager of the financial institution's branch office in Country Y. Petitioner is currently the General Manager of the financial institution's agency in a city in the United States ("the agency").

On September 29, 1986, petitioner was served with two subpoenas, one addressed to him personally and the other addressed to him in his capacity as General Manager of the agency. The subpoenas required him to appear and to testify before a grand jury in the District of Columbia Circuit and to produce documents for the period of 1979 to the present relating to certain named entities and individuals.[3]

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been identified in the appellate court opinion. Herein, petitioner will be referred to as "the witness," or as "petitioner," his country of citizenship will be "Country X," and the country where his testimony would expose the witness to criminal liability will be referred to as "Country Y."

[3] The petitioner was neither a target nor a subject of the grand jury's investigation. Moreover, the Court of Appeals has overstated petitioner's relationship with grand jury "targets." (Footnote Continued)

None of the requested documents is located in the agency. Any documents that relate to the named individuals and entities are in the financial institution's branch office in Country Y. However, Country Y's commercial, banking and criminal statutes provide for strict confidentiality of bank account and bank customer information. The financial institution's branch in Country Y thus did not provide the petitioner with any documents for submission to the grand jury.

The petitioner appeared before the grand jury on December 11, 1986, but declined on Fifth Amendment grounds to answer questions about accounts and records

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The record shows that petitioner's contacts were with three individuals whom he believed were respected professionals. He met infrequently with them on a social basis two or three times a year over a fourteen year period. He also had limited contact concerning a business matter in which he had no financial interest with the son of one of the individuals.

maintained by the financial institution's branches in Country Y. Thereafter, the government filed a motion to compel the petitioner's testimony. In response, the petitioner provided further evidence that his fear of foreign prosecution was real and substantial. The relevant penal statutes and regulations of Country Y which proscribe the disclosure of bank information were provided to the district court. In addition, an attorney with the office of petitioner's counsel met with the Attorney General of Country Y, legal counsel to Country Y's National Banking Commission, a former prosecutor with Country Y's Attorney General's Office, and with a number of practicing attorneys in Country Y. The attorney learned the following and outlined his findings in an affidavit submitted to the district court: Bank secrecy laws are taken very seriously in Country Y and are

strictly enforced; violations are punishable by fines and incarceration for up to two years. The Attorney General of Country Y confirmed that he would open an investigation and would prosecute any violation of Country Y's bank secrecy laws even if the actual disclosure took place in the United States and even if the disclosure were compelled by a court order. The legal counsel to the National Banking Commission stated that the Commission regularly advises banks and their employees that if they improperly disclose banking information they will be prosecuted.

In a separate affidavit submitted to the district court, the petitioner explained that his fears of prosecution are even more substantial as a result of his strong ties to Country Y. The petitioner had lived in Country Y for over fourteen years. His wife and two children are

citizens of Country Y, and he owns a home in that country. His wife's parents live in Country Y, and petitioner and his family frequently travel there. The government offered no evidence in rebuttal to any of these points.

The District Court's Decisions

On January 9, 1987, the district court granted the petitioner immunity pursuant to 18 U.S.C. § 6002, 6003. In a Memorandum and Order dated January 21, 1987, the district court also granted the government's motion to compel and ordered the petitioner to comply with the subpoenas. The court declined to decide directly whether the Fifth Amendment privilege against self-incrimination applied to the threat of foreign prosecution. Relying solely upon the secrecy afforded grand jury proceedings by Rule 6(e) of the Federal Rules of Criminal Procedure, the district

court found that petitioner's fear of incrimination was insubstantial and speculative. The court reasoned that the "strict" secrecy requirements of Rule 6(e) would prevent the disclosure of testimony to those outside the grand jury process and that "any evidence obtained will be unavailable to ... officials [of Country Y] without an Order of this Court." Id.

The petitioner again appeared before the grand jury on April 9, 1987, as required. As to those matters which implicated Country Y's bank secrecy laws, he invoked his Fifth Amendment privilege against self-incrimination.

On June 5, 1987, the district court found petitioner in contempt and ordered him committed to the custody of the Attorney General for the life of the grand jury or until such time as he purged himself of contempt. However, the court acknowledged

that the issues raised were of such significance that guidance was needed by the appellate court and, accordingly, stayed its contempt order.

The Court of Appeals' Decision

On August 7, 1987, the United States Court of Appeals for the District of Columbia Circuit affirmed the district court with respect to petitioner.[4] The Court of Appeals agreed with the district court's determination that the petitioner's fear of foreign prosecution was not "real," as required by Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), but disagreed with the district court's reliance upon Rule 6(e). Instead, the Court of Appeals found that petitioner's fear of prosecution by Country Y

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[4] The Court reversed the district court's decision holding the financial institution in contempt, relying on principles of comity and international law.

was not "real" because the petitioner could only be prosecuted by Country Y as a result of his own voluntary act -- returning to Country Y. The court "added" to the rule in Zicarelli a new principle that the Fifth Amendment "does not protect against dangers voluntarily assumed." Thus, despite petitioner's close ties to Country Y, his relatives in Country Y, and his home and property in Country Y, the court did not consider petitioner's fear of prosecution by Country Y to be sufficiently "real" because petitioner could not be extradited from the United States to Country Y for violating its bank secrecy laws. The appellate court stayed the issuance of a mandate for thirty (30) days to enable petitioner to file a petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED TO RESOLVE CONFLICTS AND CONFUSION AMONG THE FEDERAL COURTS REGARDING WHAT CONSTITUTES A "REAL AND SUBSTANTIAL" FEAR OF PROSECUTION BY A FOREIGN COUNTRY

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972), is the only case in which this Court has considered the assertion of the Fifth Amendment privilege by a witness who fears prosecution by a foreign country. The Court did not reach the constitutional issue in Zicarelli because it found that the witness was "never in real danger of being compelled to disclose information that might incriminate him under foreign law." Id. at 480. However, in holding that the Fifth Amendment "protects against real dangers, and not remote and speculative possibilities," id. at 479, the Court reaffirmed well-established principles. The Court did not announce a new rule

regarding the threshold of danger required where the threat of foreign prosecution is involved, as distinct from prosecution by the federal or a state government. See id. at 479, n.12.

A. The Federal Circuits Have Developed Conflicting "Special Factors" and Different "Tests" Which Have Led to Disarray and Inconsistent Decisions

Since Zicarelli was decided, the federal courts have developed several conflicting tests to determine whether the threat of foreign prosecution is "real and substantial." The United States Court of Appeals for the Second Circuit has led the way. In In re Flanagan, 691 F.2d 116, 121 (2d Cir. 1982), the court enumerated five factors which must be considered when a witness claims to fear foreign prosecution: "[1] Whether there is an existing or potential foreign prosecution of him; [2] what foreign charges could be filed against him;

[3] whether prosecution of him would be initiated or furthered by his testimony; [4] whether any such charges would entitle the foreign jurisdiction to have him extradited from the United States; and [5] whether there is a likelihood that his testimony given here would be disclosed to the foreign government." Id. at 121 (numbers added).[5] The Flanagan factors have been cited with approval and have been adopted by the United States Courts of Appeals for the Fourth,[6] Seventh,[7] and Eleventh[8] Circuits.

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5 See also In re Gilboe, 699 F.2d 71 (2d Cir. 1983); In re Grand Jury Proceedings (Chevrier), 748 F.2d 100 (2d Cir. 1984).

6 United States v. (Under Seal), 794 F.2d 920 (4th Cir.), cert. denied, 107 S.Ct. 331 (1986).

7 In re Maskutaitis, 800 F.2d 159 (7th Cir. 1986).

8 Application of President's Commission on Organized Crime (Scaduto), 763 F.2d 1191 (11th Cir. 1985).

Flanagan itself gave no guidance as to whether all five factors must be met, whether one was sufficient, or whether some were more important than others thus requiring a "balancing" test analysis. Not surprisingly, the courts have applied these factors inconsistently. While in the Second Circuit all five factors must be met, the Eleventh Circuit in Scaduto and the Seventh Circuit in Maskutaitis focus on the last factor, the likelihood that the witness' testimony would be disclosed to a foreign government.

As opposed to the more complex Flanagan factors, the Fifth,[9] Eighth,[10] Ninth[11] and Tenth[12] Circuits have opted for

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9 In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); In re Grand Jury Proceedings (Postal), 559 F.2d 234 (5th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); United States v. Armstrong, 476 F.2d 313 (5th Cir. 1973).

10 In re Baird, 668 F.2d 432 (8th Cir.), cert. denied, 456 U.S. 982 (1982).
(Footnote Continued)

a blanket rule that the secrecy of grand jury proceedings under Fed. R. Crim. P. 6(e) sufficiently protects witnesses who fear foreign prosecution. Several other federal courts, however, have specifically rejected any rule relying solely on grand jury secrecy.[13]

In the instant case, the Court of Appeals has isolated its own "special" factor. The court only considered whether the witness could be extradited to Country Y. Moreover, in applying this newly enun-

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[11] In re Weir, 495 F.2d 879 (9th Cir. 1974), cert. denied, 419 U.S. 1038 (1975); In re Campbell, 628 F.2d 1260 (9th Cir. 1980); In re Federal Grand Jury Witness (Lemieux), 597 F.2d 1166 (9th Cir. 1979).

[12] In re Grand Jury Proceeding (Nigro), 705 F.2d 1224 (10th Cir. 1982), cert. denied, 461 U.S. 927 (1983); In re Parker, 411 F.2d 1067 (10th Cir. 1969), vacated as moot sub nom. Parker v. United States 397 U.S. 96 (1970).

[13] United States v. (Under Seal), 794 F.2d 920 (4th Cir.), cert. denied, 107 S.Ct. 331 (1986); In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972).

ciated test, the Court discounted the witness' substantial ties to Country Y -- ties which he would necessarily be forced to sever if he were to "voluntarily" refrain from venturing there: (1) His wife and children are citizens of that country; (2) he visits relatives there frequently; and (3) he owns a home and other property in the country.

Finally, a few federal district courts have adhered to the basic principles enunciated in Zicarelli and have upheld witnesses' invocation of the Fifth Amendment privilege when their answers could incriminate them under foreign law. See, e.g., In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972); Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981).

The Court should grant the writ to resolve these conflicts among the federal courts.

B. The Decision by the Court of Appeals, As Well As Other Circuits, Have Failed to Follow Supreme Court Precedents

A witness who fears that his testimony will incriminate him under foreign law has significantly less protection than if he fears domestic prosecution. This is so whether the witness finds himself: (1) In the Second, Seventh or Eleventh Circuits attempting to meet the strict Flanagan factors; (2) in the Fifth, Eighth, Ninth or Tenth Circuits and forced to rely on the "secrecy" of grand jury proceedings; or (3) in the District of Columbia Circuit where he would be protected only if travel to the foreign country were "involuntary." None of these tests comports with well established precedent in this Court.

In Zicarelli, the risk of self-incrimination was insubstantial because the witness was not posed a question which required a response implicating a foreign

law or jurisdiction. The Court in Zicarelli gave no indication whatsoever that the issue was to be treated any differently or involve "special factors" because a foreign, as distinct from domestic, prosecution was allegedly threatened.[14] In reaffirming that the privilege only protects against "real dangers," this Court cited to a line of cases involving the threat of domestic prosecution. Id. at 479, n.12.

Before Zicarelli, the Court had explained that the privilege was to be liberally construed, Spevack v. Klein, 385 U.S. 511, 516 (1967), and could be asserted when a witness reasonably apprehended a risk of self-incrimination although no

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[14] Indeed, the Court indicated just the opposite: "Should the Commission inquire into matters that might incriminate him under foreign law and pose a substantial risk of foreign prosecution ... then a constitutional question will be squarely presented." Zicarelli, 406 U.S. at 482.

criminal charges are pending against him. Marchetti v. United States, 390 U.S. 39, 53 (1968). The risk of incrimination must be more than "insubstantial" or "trifling" and the privilege must be sustained where the compelled response "might be dangerous because injurious disclosure could result." Hoffman v. United States, 341 U.S. 479, 488 (1951). Accord Malloy v. Hogan, 378 U.S. 1, 11 (1964).

These principles were reaffirmed in Pillsbury Company v. Conboy, 459 U.S. 248 (1983). In Conboy, this Court upheld the invocation of the Fifth Amendment by a witness in a civil deposition who had previously been given immunity for answering the identical questions in a federal grand jury. The witness had never been prosecuted and was free, in any event, to contest the legality of any future charges as violating his immunity agreement. See

Kastigar v. United States, 406 U.S. 441 (1972). Nonetheless, this Court held that he could not be compelled to testify simply because of a court's "predictive judgment" of what could occur in future proceedings. Conboy, 459 U.S. at 261.

The rule in effect in the Fifth, Eighth, Ninth and Tenth Circuits relying on grand jury secrecy violates these precedents and is in direct conflict with Conboy. While it may not be often that law enforcement officials fail to honor the grand jury secrecy rule, "the constitutional protection of the witness must rest on more than faith." In re Cardassi, 351 F. Supp. 1080, 1082 (D. Conn. 1972). A witness with a real fear of self-incrimination should not be deprived of constitutional protection because of a court's "predictive judgment." Moreover, as the Fourth Circuit explained in Under Seal, the

basic flaw in relying upon grand jury secrecy is that if an inadvertent disclosure is made "the courts of the United States are powerless to restore secrecy once it is lost." Under Seal, 794 F.2d at 925.

The stringent "factors" employed in the Second, Seventh and Eleventh Circuits similarly depart from the principles developed by this Court. In the domestic context the witness need not rely on the "predictive judgment" of the court where he reasonably apprehends self-incrimination, Conboy, 459 U.S. at 250-251, and need not make a showing under a multi-factored and structured test. Moreover, even where the witness makes a showing with respect to the Flanagan factors, at least one circuit has refused to hold that there is a "real and substantial" fear. See Scaduto, 763 F.2d 1191 (11th Cir. 1985). While there might be a "strong possibility" of each respec-

tive factor occurring, the court in Scaduto reasoned that the chances were much lower that all five would occur together. Clearly, the heightened requirement of meeting five separate, special factors is a far cry from the minimal requirements of Zicarelli, Hoffman and Conboy.

Finally, although Zicarelli makes no mention of extradition as a factor, the Court of Appeals in this case isolated the "voluntariness" of the witness' return to Country Y as the basis for its determination that the witness' fear of foreign prosecution was neither real nor substantial. As discussed above, this Court in Conboy found that such "predictive judgments" were inappropriate, so long as the witness reasonably apprehends self-incrimination.

The Court should grant the writ to ensure that the Court of Appeals in this

case, and in other circuits, follow well-established Fifth Amendment jurisprudence.

C. The Decision by the Court of Appeals Impermissibly Requires the Witness to Forgo Important Constitutional Rights

In focusing on the fact that the witness would likely not be extradited to Country Y, the Court of Appeals overlooked the issue that the failure to uphold the witness' right against self-incrimination in this case would force him to forgo other important constitutional rights.

First, the decision effectively forces the witness to forgo his right to travel to Country Y as he would face prosecution upon touching its soil. It is true that this Court has distinguished the freedom to travel outside the United States from the right to travel within the United States. Haig v. Agee, 453 U.S. 280, 307 (1981); Califano v. Aznavorian, 439 U.S. 170, 176 (1978). However, the right of inter-

national travel is firmly grounded in the "liberty" interest protected by the Due Process Clause of the Fifth Amendment and can only be regulated within the bounds of due process of law. Haig, 453 U.S. at 307; Califeiro, at 176; Kent v. Dulles, 357 U.S. 116, 126-127 (1958).

The Court of Appeals has effectively deprived the witness of his "liberty" right to travel to Country Y. The deprivation of the witness' right to travel to Country Y is a serious curtailment of his "liberty" since the witness has longstanding and substantial ties to Country Y.

Second, the decision effectively forces the witness to forgo his right to hold and enjoy his property in Country Y. Under the rationale adopted by the Court of Appeals, the witness' fear of foreign prosecution is only speculative if he "voluntarily" abandons these property rights.

This Court has found that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968). The rationale of the Court of Appeals forces precisely such a "Hobson's choice" upon the witness in this case. See id., 390 U.S. at 391. The Court of Appeals did not consider nor even balance the competing constitutional rights at stake herein.[15] The writ should be granted to ensure that the values protected

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15 To be sure, the Constitution does not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973). In determining which such "choices" are permissible, "'the threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.'" Chaffin, 412 U.S. at 32, quoting McGautha v. California, 402 U.S. 183, 213 (1971). Accord Jenkins v. Anderson, 447 U.S. 231, 236 (1980). As the Court explained in Murphy v. Waterfront Commission, 378 U.S. 52 (1964), the policies underlying the Fifth Amendment would be defeated if not recognized in different jurisdictions. 378 U.S. at 55-56.

by the Fifth Amendment are not compromised by this judicially imposed "Hobson's choice."

II. THE WRIT SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE FEDERAL COURTS WHETHER THE RIGHT AGAINST SELF-INCRIMINATION EXTENDS TO THE FEAR OF PROSECUTION BY A FOREIGN COUNTRY

Although the constitutional issue has arisen repeatedly, most courts have resolved the matter with the threshold determination that the risk of foreign prosecution failed to meet the variety of "real and substantial" factors and tests. Where the constitutional issue has been reached, however, the federal and state courts have clearly been divided.[16] This

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16 Compare Mishima v. United States, 507 F. Supp. 131 (D. Alaska 1981) (recognizing the applicability of the privilege where there is a real and substantial risk of foreign prosecution), United States v. Trucis, 89 F.R.D. 671 (E.D. Pa. 1981) (same); In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) (same), with United States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986) (rejecting Fifth Amendment privilege despite showing of real and substantial risk of foreign prosecution); In Re Parker, 411 F.2d 1067 (Footnote Continued)

conflict is also reflected in the academic analyses of the issue.[17] The issue would be squarely presented here if the Court reverses the appellate court's conclusion that the petitioner's fear of prosecution by Country Y is "unreal."

As is apparent from a review of the numerous foreign prosecution cases which have considered the threshold and the constitutional issues, the law is in a state of disarray. Yet, the issue has recurred

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(10th Cir. 1969) (same), vacated as moot sub nom. Parker v. United States, 397 U.S. 96 (1970); Phoenix Assurance Co. v. Runck, 317 N.W.2d 402 (N.D.) (same), cert denied, 459 U.S. 862 (1982).

17 Compare Note, Testimony Incriminating Under the Laws of a Foreign Country -- Is There a Right to Remain Silent?, 11 N.Y.U. J. Int'l L. & Pol. 359 (1978); Comment, Fear of Foreign Prosecution and the Fifth Amendment, 58 Iowa L.Rev. 1304 (1973); Comment, Criminal Law -- Self-Incrimination -- The Fifth Amendment Protects a Witness Who Refuses to Testify for Fear of Self-Incrimination Under the Laws of a Foreign Jurisdiction, 5 Rut.-Cam.L.Rev. 146 (1973), with Note, The Reach of the Fifth Amendment Privilege When Domestically Compelled Testimony May Be Used In a Foreign Country's Court, 69 Va.L.Rev. 875 (1983).

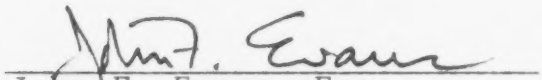
with increasing frequency as grand juries and other investigations probe foreign currency transactions and other matters which have international implications. Under the current state of the law, witnesses are faced with a double-layer of uncertainties. A witness is first faced with the uncertainty whether his fears of self-incrimination will rise to the level of legitimacy under the particular "test" or "factors" in effect in the jurisdiction in which he happens to find himself, and, second, in any event, whether the Fifth Amendment even applies at all.

The Court should grant the writ in order to eliminate the uncertainty and costly litigation in this area.

CONCLUSION

For the foregoing reasons, the petitioner requests that the Court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 5 day of September, 1987 to The Solicitor General, Department of Justice, Washington, D.C. 20530; and J. Michael Hannon, Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia, 555 4th Street (Fifth Floor), Washington, D.C. 20001.

John F. Evans

John F. Evans

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5208

IN RE: SEALED CASE

No. 87-5209

IN RE: SEALED CASE

Appeals from the
United States District Court
for the District of Columbia
(Misc. No. 87-00003)

Argued July 2, 1987

Decided August 7, 1987

Before: WALD, Chief Judge, MIKVA and
BORK, Circuit Judges

Opinion Per Curiam.

PER CURIAM: These consolidated appeals are taken from orders in a miscellaneous proceeding below collateral to a grand jury investigation. The government sought and obtained orders in the district court compelling appellants, a bank and an individual, to respond to a grand jury subpoena by producing documents and giving testimony. When appellants continued to refuse to respond to the grand jury's demands, the court found appellants in contempt. The grand jury investigation has not been completed, and the records in the district court and this court have been sealed. In order to maintain this secrecy, we do not identify the parties in this opinion. See Fed.R.Crim.P. 6(e).

I.

There are two appellants in these appeals. Appellant in Number 87-5209 is a bank owned by the government of Country

X. The bank does business in many countries around the world, including the United States and Country Y. Country Y is a foreign nation with banking secrecy laws that make it a criminal offense for a bank or a person to reveal to anyone other than the customer, information about banking transactions or bank documents created in Country Y that relate to the customer and his transactions.

Appellant in Number 87-5208 is an individual who is currently employed as the manager of the bank's agency in a city in the United States. The manager is a citizen of Country X, though he has significant family and property connections to Country Y. For several years in the early 1980s the manager was the assistant manager of the bank's branch in Country Y.

In the course of a grand jury investigation into an alleged scheme by a

number of American citizens and business entities to launder money in violation of 18 U.S.C. § 371 (1982) and 31 U.S.C. § 5322 (1982), the United States Attorney for the District of Columbia issued a subpoena duces tecum to the manager and the bank. The subpoena sought bank documents created and held in the bank's branch office in Country Y which are believed to contain information concerning the illegal financial transactions. Many of the transactions documented by the subpoenaed papers were created while the manager was assistant manager of the branch in Country Y. In addition, he is a personal friend and has been a business associate of several of the targets of the grand jury investigation. The subpoena also sought, therefore, the manager's testimony about bank transactions and other matters of which he has personal knowledge. Neither

the bank nor the manager is a target of the investigation or suspected of any wrongdoing.

From the beginning, the manager and the bank have cooperated to a certain extent with the investigation. The manager has come to Washington several times to meet with the prosecutors and testify before the grand jury about his knowledge of the targets and their activities that he learned in his personal capacity (not through bank operations). Except for information concerning three customers from whom they obtained releases, however, the manager and the bank refused to testify before the grand jury about the targets' banking activities or produce documents on the ground that to do so would violate Country Y's banking secrecy laws and subject the manager and the bank to criminal prosecution in Country Y.

The bank has taken the position that the government should use other means to attempt to obtain the documents from Country Y, a course that the government believes is inappropriate and would be ineffective. The manager based his refusal to testify on fifth amendment grounds, claiming that the act of testifying would subject him to criminal sanctions in Country Y. The government secured use immunity for the manager but he continues to decline to answer on the ground that a United States court could not immunize him from criminal prosecution in Country Y. Since the act of testifying would violate the laws of Country Y, he contends that to require him to testify would violate his fifth amendment protection against self-incrimination.

The government filed a motion in the district court seeking an order compelling

both the bank to surrender the records and the manager to testify. The court conducted a hearing and issued an order on January 21, 1987, granting the government's motion. Through an inadvertence, neither the government nor appellants learned of the order until the time for compliance had passed. The court issued an amended order on March 12, 1987, setting a new date by which compliance must take place. Before the time to comply expired, the manager and the bank notified the prosecutor that they would not comply for the previously stated reasons.

The manager was called before the grand jury again on April 9, 1987, at which time he again read a statement declining to respond on fifth amendment and comity grounds - that to answer would violate the laws of Country Y and subject him and the bank to criminal prosecution there. The

government then moved the district court to hold the bank and the manager in civil contempt. The court issued a show cause order on May 13, 1987. In an attempt to block further proceedings, Country X delivered a note verbale to the United States Department of State requesting that "no compelling means" be ordered against its bank.

The court conducted a hearing on the show cause order on June 5, 1987, and immediately issued an order holding appellants in civil contempt. To coerce compliance with its order, the court ordered that the bank be fined $50,000.00 per day and the manager be confined until they purged their contempt. The court entered a second order staying the sanctions pending appeal. Appellants noted their appeals from the orders compelling responses and the contempt order on June 8,

1987.[1]

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1 This court entered an order setting an expedited briefing and argument schedule based on the requirement that "[a]ny appeal from an order of confinement under [the recalcitrant witness] section shall be disposed of as soon as practical, but not later than thirty days from the filing of such appeal." 28 U.S.C. § 1826(b) (1982). Counsel for the bank has sent a letter to the Clerk citing case law from other circuits holding or stating that when the order of confinement is stayed, the thirty day time limit is inapplicable. In re Grand Jury Proceedings re: Larson, 785 F.2d 629, 631, n.4 (8th Cir. 1986); In re Witness Before Special October 1981 Grand Jury, 722 F.2d 349, 353 (7th Cir. 1983); In re Kitchen, 706 F.2d 1266, 1271 n.2 (2d Cir. 1983); In re Weiss, 703 F.2d 653, 660 n.6 (2d Cir. 1983). Counsel also cites In re Sealed Case, 794 F.2d 749, 750-51 (D.C. Cir. 1986), in which this court held that the thirty day time limit is not jurisdictional and that if the court takes more than thirty days, the witness need not be released from custody.

We held argument in this case on July 2, 1987, six days before the thirty day time limit was scheduled to expire. The issues in this case are ones of first impression and have required close scrutiny. Rather than "rush to judgment," we have taken more than thirty days to decide this appeal. At this time, however, we decline to rule that when a § 1826 confinement order is stayed pending appeal, the thirty day time limit does not apply. We recognize, however, that appeals from any orders under the recalcitrant witness statute must be given expedited treatment. 28 U.S.C. § 1657(a) (1982).

II.

The manager's fifth amendment claim is based on his assertion that Country Y could convict him of a crime solely for revealing information protected by Country Y's banking secrecy law. He does not claim that the substance of his testimony would incriminate him for any crime that he has committed, under either the laws of the United States, of Country X, or of Country Y. The manager argues that, despite the district court's grant of immunity, his real and substantial fear of prosecution in Country Y cloaks his refusal to testify with fifth amendment protection. We disagree.

In Malloy v. Hogan, 378 U.S. 1 (1964), the Supreme Court held that the fifth amendment privilege against self-incrimination must be deemed fully applicable to the States through the

fourteenth amendment. In Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), decided the same day, the Court held that a state witness granted use immunity may not be compelled to testify unless the testimony and its fruits cannot be used against him in a federal prosecution.

The Supreme Court has not yet determined whether fear of prosecution by a foreign country is sufficient to invoke the fifth amendment. In Zicarelli v. New Jersey Investigation Comm'n, 406 U.S. 472 (1972), the Court noted probable jurisdiction to consider this issue, but found it unnecessary to reach the constitutional question. The manager recognizes that Murphy did not expressly extend to foreign prosecutions, but argues that the Court expressly gave the privilege the same construction as the English courts did. See 378 U.S. at 77. "The [English]

rule did 'protect witnesses against disclosing offenses in violation of the laws of another country.' United States of America v. McRae, [L.R., 3 Ch. App. 79 (1867)]." Id. at 72. Lower courts have been divided on this question. Compare United States v. (Under Seal), 794 F.2d 920 (4th Cir.) (fifth amendment only applicable if foreign jurisdiction has similar privilege), cert. denied, 107 S.Ct. 331 (1986) with In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) (values expressed by fifth amendment bar compulsion of testimony that could be used in any foreign prosecution). We find it unnecessary to resolve the issue in this case.

The district court concluded that even if the fifth amendment does apply to a situation in which the witness asserts the threat of foreign prosecution, it "[was] not convinced that the fear of prosecution

in this case is 'real' as required by Zicarelli v. New Jersey Comm'n of Investigation, 406 U.S. 472, [478-81] (1972)." In re Grand Jury Investigation, Misc. No. 87-0003, mem. op. at 4 (D.D.C. Jan 21, 1987). It based this finding on the strict secrecy provisions of Fed. R. Crim. P. 6(e).

We agree that the manager's fear of prosecution is not real, but for a different reason. The manager could only be prosecuted by Country Y as a result of his own voluntary act - returning to Country Y. We recognize his substantial connections to Country Y, but he no longer lives or works there. He is not himself a citizen of that country and his immediate family is with him in this country. As the manager concedes, the offense with which he could be charged by Country Y for his testimony here is not an offense for which

he could be extradited. He could only be punished for this offense if he were to return voluntarily. "It is well established that the [fifth amendment] privilege protects against real dangers, not remote and speculative possibilities." Zicarelli, 406 U.S. at 478. We, only add that it does not protect against dangers voluntarily assumed. We therefore, affirm the order of the district court holding the manager in contempt for refusing to testify before the grand jury.

III.

The bank argues that the district court erred in entering a civil contempt order that compels it to act in violation of the laws of Country Y. The federal courts have disagreed about whether a court may order a person to take specific actions on the soil of a foreign sovereign in violation of its laws and about what

sanctions the court may levy against a person who refuses to comply with such an order. A line of older Second Circuit cases takes the position that a court should not order violations of foreign law on foreign territory. See United States v. First Nat'l City Bank, 396 F.2d 897, 901-02 (2d Cir. 1968); Inge v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960); First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616, 619 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960). Other cases distinguish between a court's ability to order a person to produce documents in contravention of foreign law, which is thought to be acceptable, and its ability to impose sanctions for disobedience to that order, which is thought to be much more problematic. See, e.g., In re Westinghouse Elec. Corp. Uranium Contracts, 563 F.2d 992, 996-99 (10th Cir. 1977); Compagnie

Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 26-36 (S.D.N.Y. 1984); cf. Societe Internationale v. Rogers, 357 U.S. 197, 204-13 (1958). Two recent Eleventh Circuit cases, however, indicate that court's willingness to approve civil contempt orders and accompanying sanctions that seek to compel a person to violate foreign secrecy laws by producing documents that are located on foreign soil. See In re Grand Jury Proceedings (the Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985); In re Grand Jury Proceedings, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983); cf. United States v. Vetco Inc., 691 F.2d 1281 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).

We do not here decide the general issue of whether a court may ever order

action in violation of foreign laws, although we should say that it causes us considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question. Be that as it may, here we simply conclude that even if a court has the power to issue such contempt orders under certain circumstances, on the peculiar facts of this case the order should not have been issued. Most important to our decision is the fact that these sanctions represent an attempt by an American court to compel a foreign person to violate the laws of a different foreign sovereign on that sovereign's own territory. In addition, the bank, against whom the order is directed, is not itself the focus of the criminal investigation in this case but is a third party that has not been accused of

any wrongdoing. Moreover, the bank is not merely a private foreign entity, but is an entity owned by the government of Country X. We recognize that one who relies on foreign law assumes the burden of showing that such law prevents compliance with the court's order, see, e.g., Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10th Cir.), cert. denied, 439 U.S. 832 (1978), but here the government concedes that it would be impossible for the bank to comply with the contempt order without violating the laws of Country Y on Country Y's soil. The district court specifically found that the bank had acted in good faith throughout these proceedings. The executive branch may be able to devise alternative means of addressing this problem, but the bank cannot.

The two cases in which the Eleventh Circuit has upheld civil contempt orders of

this nature are distinguishable from the situation before us. In the first case, the contempt order was directed against an American entity, and there was a substantial dispute over whether that entity in fact exercised complete control over the documents that were being sought. Thus, there was considerable room for doubt whether enforcement of the order would require violation of foreign laws on foreign soil. See In re Grand Jury Proceedings, 691 F.2d at 1386-87. In addition, the trial court specifically found that the contemner had not made a good faith effort to comply with the subpoena. Id. at 1389. In the second case, the trial court also found that the contemner had not acted in good faith, but had undertaken an "extensive pattern of delay" in the erroneous belief that foreign law barred production of the documents in

question. See In re Grand Jury Proceedings, 740 F.2d at 826. Even if the power to enter a contempt order like the one in this case is theoretically within a court's province, we think that the facts of this case do not warrant the exercise of such a troublesome authority.

A decision whether to enter a contempt order in cases like this one raises grave difficulties for courts. We have little doubt, for example, that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders. The legal expression of this widespread sentiment is found in basic principles of international comity. But unless we are willing simply to enter contempt orders in all such cases, no matter how extreme, in utter disregard of comity principles, we are obliged to undertake the unseemly task of picking and

choosing when to order parties to violate foreign laws. It is conceivable that we might even be forced to base our determination in part on a subjective evaluation of the content of those laws; an American court might well find it wholly inappropriate to defer to a foreign sovereign where the laws in question promote, for example, torture or slavery or terrorism.

These kinds of concerns bring us very close to the act of state doctrine, which, though it arises in a different context, cautions courts not to "sit in judgment on the acts of the government of another done within its own territory." Underhill v Hernandez, 168 U.S. 250, 252 (1897). Here, as there, we see good reason for courts not to act on their own, even at the urging of the executive branch, when their actions "may hinder rather than further this

country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); see also International Ass'n of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1358-59 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). We have no doubt that Congress could empower courts to issue contempt orders in any of these cases, or that the executive branch could negotiate positive agreements with other nations to the same end. If we were asked to act in accord with such a distinct and express grant of power, it would be our duty to do so. Indeed, any such measures would be a welcome improvement over the difficulties and uncertainties that now pervade this area of the law.

In sum, we emphasize again the limited nature of our holding on this issue. If any of the facts we rest on here were different, our holding could well be different. And though we reverse the district court's order holding the bank in civil contempt on the facts of this case, we of course intend no challenge to the proposition that the vital role of grand jury investigations in our criminal system endows the grand jury with wide discretion in seeking evidence. See, e.g., United States v. Dionisio, 410 U.S. 1 (1973). It is therefore also relevant to our conclusion that the grand jury is not left empty-handed by today's decision. The manager will be available and able to testify as to many of the facts that the grand jury may wish to ascertain. The government may find alternative means to obtain additional information from or

through the bank. Though we recognize that the grand jury's investigation may nonetheless be hampered, perhaps significantly, we are unable to uphold the contempt order against the bank.

Affirmed in part and reversed in part.